

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Request for Review of the Decision of the
Universal Service Administrator by

International Business Machines Corporation

Federal-State Joint Board on
Universal Service

Changes to the Board of Directors of the
National Exchange Carrier Association, Inc.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-45

CC Docket No. 97-21

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
INTERNATIONAL BUSINESS MACHINES CORPORATION**

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TABLE OF CONTENTS

SUMMARY	i
I. FACTUAL BACKGROUND	1
II. YSLETA SELECTED THE MOST COST-EFFECTIVE SERVICE PROVIDER THROUGH A COMPETITIVE BIDDING PROCESS THAT FULLY COMPLIED WITH FCC, SLD, AND STATE REQUIREMENTS	11
A. Ysleta Complied with the FCC Form 470 Posting Process	11
B. As Required by the FCC, Ysleta Followed the Competitive Bidding Procedures Mandated by State and Local Procurement Rules.....	16
1. The FCC's Rules and the Orders Adopting Them Require Applicants to Comply with State and Local Procurement Rules....	17
2. The Further Explanation Ignored Ysleta's Information Regarding the Interrelationship of the RFP and the Form 470	20
C. Ysleta's Systems Integration RFP Allowed Ysleta to Select the Most Cost-Effective Provider of the Services Ysleta Needs.....	21
D. Price Was Properly Considered in Ysleta's Selection of IBM	25
1. The Further Explanation Misstates the Commission's Price Standard	26
2. Ysleta's Price Evaluation Complied with the Commission's Standard	28
E. Ysleta's Procurement Methodology Keeps Prices Competitive Even After the Contract is Finalized	32
III. THE <i>FURTHER EXPLANATION</i> MISCHARACTERIZES THE CONTRACT AND THE RFP RESPONSE IN ITS DISCUSSION OF INELIGIBLE AND FREE SERVICES.....	34
IV. IBM DID NOT OFFER TO WRITE YSLETAS TECHNOLOGY PLAN AFTER THE FCC FORM 470 WAS FILED	35
V. YSLETA AND IBM DID NOT SEEK TO INAPPROPRIATELY MAXIMIZE FUNDING SUPPORT	36
VI. YSLETA USED A NEUTRAL SELECTION PROCESS TO CHOOSE IBM.	38
VII. YSLETA STUDENTS SHOULD NOT BE PENALIZED BY RETROACTIVE APPLICATION OF NEW OPERATING PROCEDURES.....	40
VIII. CONCLUSION	42

TABLE OF ATTACHMENTS

Attachment

- 1 Letter, Further Explanation of Administrator's Funding Decision, Ysleta Independent School District, Form 471 Application No. 321479, Funding Year 2002, Case #SR-2002-142115
- 2 Technology Plan, Ysleta Independent School District
- 3 Projects Summary
- 4 *FCC Form 470*, Ysleta Independent School District
- 5 Request for Proposal, Ysleta Independent School District
- 6 Responses, to Ysleta Request for Proposal
- 7 Solicitation Award Summary, Ysleta Independent School District
- 8 General Contract, Ysleta Independent School District Contract No. 2002-850-142
- 9 Facsimile, from Richard Duncan (Ysleta), to Michael Deusinger (SLD) (June 3, 2002)
- 10 Tip Sheet, SLD's Tips for completion of Form 470
- 11 Eligible Services List, Schools and Libraries Support Mechanism (October 18, 2002)
- 12 Letter, from Richard Duncan (Ysleta), to Michael Deusinger (SLD) (June 21, 2002)
- 13 *Article*, "Buying Smart: State Procurement Reform Saves Millions", Report by National Association of State Purchasing Officials (NASPO) and the National Association of State Information Resource Executives (NASIRE) (September 1996)
- 14 Article, "Reforming State Procurement to Buy the Best Information Technology Solution", Report by NGA Center for Best Practices (August 1999)
- 15 Statements of Work
- 16 Project List

17 Article, "Buying Smart: Blueprint for Action," Report by National Association of State Purchasing Officials (NASPO), National Association of State Information Resource Executives (NASIRE), and National Association of State Directors of Administration and General Services (May 1998)

SUMMARY

IBM requests Commission review of a December 3, 2002, Funding Commitment Decision Letter and associated *Further* Explanation issued by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company. The SLD denied funding under the Schools and Libraries Funding Mechanism (the "E-rate program") to the Ysleta Independent School District ("Ysleta") of El Paso, Texas.

Ysleta serves some of the poorest children in the country. On a district-wide basis, 86 percent of its children are eligible for federally subsidized lunches. The FCC established the E-rate program in 1997 to provide financial support to school districts like Ysleta when they purchase Internet access, internal connections, and telecommunications services. Long before the FCC's creation of the E-rate program, however, IBM had implemented its company-wide commitment to education with a number of programs for sharing its pioneering technologies with schools and providing financial assistance to schools who serve economically disadvantaged students. Under IBM's Reinventing Education program, for example, IBM has provided over \$65 million in research, technology, technical expertise, and cash since 1994 to school districts throughout the country.

The FCC's E-rate program strikes a careful balance between federal jurisdiction over the disbursement of E-rate funds and the jurisdiction of state and/or local authorities over the budgets and procurement rules applicable to school districts. The FCC wisely refused to preempt these long-standing and

detailed state and local procurement regimes to create a duplicative federal procurement system. Instead, the Commission's rules rely on school district compliance with state and local competitive procurement rules to ensure that schools use competitive bidding practices to obtain the most cost-effective services and products with their E-rate funding. The Commission has repeatedly emphasized its reliance on, and deference to, state procurement regimes in its rules and in a number of decisions applying those rules.

The Further *Explanation* violates the careful jurisdictional balance struck by the FCC. SLD denied funding to Ysleta in part because, as permitted under Texas law, Ysleta released a request for proposal ("RFP") to solicit competitive bids for the E-rate products and services it sought, in addition to filing an FCC Form 470. The Further *Explanation* erroneously concluded that Ysleta filled out the Form 470 incorrectly and mistakenly held that Ysleta could not select a service provider as the result of an RFP when, in fact, Ysleta completed its Form 470 correctly and the FCC's rules require Ysleta to use an RFP or other state-approved procurement mechanism.

The Further *Explanation* also held that Ysleta did not select the most cost-effective provider of service with price being the primary factor. But that holding ignored both the FCC's formal guidance on pricing standards and the specific price review process required under Ysleta's RFP and followed by Ysleta's procurement personnel. Pursuant to that process, Ysleta conducted a thorough and independent evaluation of IBM's prices and negotiated significant reductions in price. Ysleta's selection process and evaluation of pricing, which the Further

Explanation does not acknowledge, fully complied with the FCC's pricing standard.

Next, the Further Explanation improperly assumed that Ysleta and IBM engaged in impermissible activities based on misinterpretations and mischaracterizations of IBM's proposal and the RFPs issued by other school districts. For example, the Further Explanation asserts that IBM and Ysleta may have re-written Ysleta's Technology Plan after Ysleta posted its Form 470 based on IBM's statement in its RFP response that it "can help develop your technology plan." This standard marketing description of IBM's capabilities and expertise cannot reasonably be interpreted as an offer to write Ysleta's plan, particularly since the parties never contracted for the service. And, in fact, Ysleta's Technology Plan was completed five months before it filed its FCC Form 470 and six months before IBM provided its RFP response.

The Further Explanation similarly charges that Ysleta and IBM sought only to "maximize SLD funding" instead of pursuing the objectives in Ysleta's technology plan. This allegation misinterprets innocuous statements in IBM's RFP Response and unjustifiably attributes illicit motivations to Ysleta and IBM where none exist. The Commission itself has previously pointed out that "maximizing federal support" is not prohibited by its rules. Indeed, SLD rules that discouraged eligible recipients from seeking all of the funding for which they qualify would be inconsistent with the statutory objectives of the program and counterproductive for the program itself. The Further Explanation would penalize schools for simply seeking all of the funding to which they are legally entitled.

Finally, the Further Explanation assumes bias in Ysleta's selection process because of similarities in RFPs issued by different school districts who may have chosen IBM to provide some E-rate products and services. Any conclusion that IBM is responsible for uniformity among RFPs is an unreasonable leap in logic. In fact, Ysleta did not base its RFP on an RFP from IBM but on an RFP issued by another school district. Such sharing among school districts is neither improper nor inconsistent with the FCC's rules. Indeed, the Commission should encourage it as a very cost-effective and efficient way for schools to develop RFPs without re-inventing the wheel for standardized or uniform aspects of the solicitation process.

Ysleta's students should not be deprived of much-needed technology assistance by the Further Explanation's sudden and unauthorized interest in overriding state and local procurement requirements and practices. If SLD has now decided to reject previously accepted and widely-used competitive bidding practices, its new standard should be clearly articulated and applied only prospectively. An ad hoc retroactive prohibition will unfairly penalize some of the nation's poorest students whose school districts reasonably relied on precedent to prepare their RFPs and choose their E-rate service providers.

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Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
INTERNATIONAL BUSINESS MACHINES CORPORATION**

International Business Machines Corporation ("IBM"), pursuant to Section 54.719 of the Commission's rules,¹ hereby submits its Request for Review of the Universal Service Administrator's Funding Decision regarding the Ysleta Independent School District.²

1. FACTUAL BACKGROUND

The Ysleta Independent School District ("Ysleta") serves some of the poorest children in the country. On a district-wide basis, 86 percent of its

¹ 47 C.F.R. § 54.719

² *Further Explanation of Administrator's Funding Decision, Ysleta Independent School District, Form 471 Application No. 321479, Funding Year 2002, Case #SR-2002-142115 ("Further Explanation"). appended hereto as Attachment 1.*

children are eligible for federally subsidized lunches.³ Despite the economic need of its student population, Ysleta believes that "[a]ll students must be prepared in their experience at the YISD [Ysleta Independent School District] for the challenges—including the technology challenges—in the educational and occupational environments they will encounter after their graduation."⁴ IBM has been assisting Ysleta to achieve its educational goals since the 1970s, long before the FCC established the Schools and Libraries Funding Mechanism or "E-rate program." IBM is keenly aware of the technology and technology support needed by school districts like Ysleta, since IBM is a pioneer in the provision of information technology and systems integration services to educational institutions.⁵

In order to meet the needs of its students, Ysleta first developed a Technology Plan in 1993 that would serve as "a comprehensive plan for acquiring, using and sustaining technology resources." The Technology Plan was updated in 1998, in part "to comply with the requirements of the E-rate program."⁷ In the Spring of 2001, Ysleta modified its Technology Plan.⁸ As

³ Request for Review of the Universal Service Administrator by Ysleta Independent School District, CC **Dkt.** Nos. 96-45, 97-21 (filed Jan. 30, 2003) at 39 ("Ysleta Request for Review").

⁴ Ysleta Technology Plan, "The YISD Vision" at 3, appended hereto as Attachment 2

⁵ For example, IBM launched the Reinventing Education program in 1994 to combine IBM's research, technical, and consulting abilities with the experience and expertise of school personnel at an early stage in the development of technology tools. Under this program, IBM has contributed \$65 million in research, technology, technical expertise, and cash to school districts throughout the country.

⁶ Ysleta Technology Plan, "History of YISD Technology Planning" at 1 (Attachment 2).

⁷ *Id.*

⁸ Ysleta Request for Review at **8**.

required by Section 54.504(b)(2)(vii) of the FCC's Rules, that Technology Plan was approved by the State of Texas.⁹

Using its May 2001 Technology Plan as a guide, Ysleta studied the market and pricing for the products and services it would need to realize the plan.” In particular, Ysleta’s information technology and procurement personnel used their knowledge of the current state of Ysleta’s digital development and available technologies to translate their Technology Plan into an “Erate Round 5 Projects Summary” (“Project Summary”).” This Project Summary identified specific features, functions and equipment, and approximate quantities that would be necessary to bring Ysleta’s schools into compliance with its Technology Plan. The Project Summary also included Ysleta’s cost estimates for these goods and services based on current market prices.¹² Ysleta was able to develop preliminary pricing information for its Project Summary because Ysleta’s staff had independently researched and reviewed pricing information for the goods and services described in the Technology Plan.¹³ Ysleta also studied the costs of certain similar projects approved by the Schools and Libraries Division (“SLD”) in the Year 4 funding year for Ysleta’s sister district, the El Paso Independent School District.¹⁴

⁹ *Id.* at 8.

¹⁰ *Id.* at 8.

¹¹ *Id.*, Exhibit 14. This Project Summary is also appended as Attachment 3.

¹² Project Summary, *passim* (Attachment 3).

¹³ Ysleta Request for Review at 8.

¹⁴ *Id.* at 8.

Nearly five months after finalizing its Technology Plan, Ysleta posted an FCC Form 470 on the SLD website on October 12, 2001, providing nationwide notice that it was seeking E-rate eligible products and services.¹⁵ Ysleta's Form 470 indicated explicitly that it was "seeking a Technology Implementation and Systems Integration Partner."¹⁶ The Ysleta Form 470 correctly indicated that Ysleta had not released a request for proposal or any other solicitation of bids at that time.

Ysleta subsequently issued request for proposal No. 22-1115-016RFP, entitled "Technology Implementation and Systems Integration Partner" ("the RFP"), on October 17, 2001.¹⁷ Generally, the RFP sought the competence and expertise necessary for "effectively introducing and applying technology throughout the District," including, among other things, "all E-Rate funded projects."¹⁸

Under Texas law, a school district must acquire goods or services in the manner that provides the "best value" to the district, considering the purchase price and other factors.¹⁹ In addition, Section 44.031(d) of the Texas Education Code permits the acquisition of professional services using the Texas Professional Services Procurement Act, which requires that any prices for such

¹⁵ Ysleta Form 470, appended hereto as Attachment 4.

¹⁶ Ysleta Form 470, Item 15(f) (Attachment 4).

¹⁷ Ysleta RFP, appended hereto as Attachment 5.

¹⁸ Ysleta RFP, § 1.1 (Attachment 5).

¹⁹ Ysleta Request for Review at 26 (*citing* Tex. Educ. Code §44.031(a) (Vernon 2002)).

services be fair and reasonable." In either case, price is an important consideration under Texas state procurement law."

Consistent with Texas law, the RFP cautioned potential respondents that price would figure prominently in Ysleta's procurement in a number of ways. The RFP warned bidders that "it is vitally important that The [sic] District receives value for its dollar."²² The RFP required bidders to ensure that "costs associated with this partnership are within normal and customary charges for the type of services provided"²³ and reminded bidders that the price was "very important to the potential success of any prospective bidders."²⁴

The RFP required a two-step evaluation of bidders' proposals.

First, because of the size and complexity of the projects envisioned by Ysleta, the RFP required Ysleta to identify the bidder that was the most qualified and the most likely to successfully deliver the products and services Ysleta was seeking. Accordingly, based on the bidders' RFP responses, Ysleta made an initial determination as to the "offeror judged to be the most capable of meeting the District's needs."²⁵ For purposes of this preliminary evaluation, bidders were required to provide detailed information regarding their competency and experience under a number of criteria listed in Section 3.7 of the RFP. In addition, Section 3.7.7 required bidders to supply pricing information consisting of

²⁰ Ysleta Request for Review at 26 (*citing* Tex. Educ. Code §44.031(d) (Vernon 2002); Tex. Govt. Code §2254.0003 (Vernon 2002)).

²¹ Ysleta Request for Review at 26.

²² Ysleta RFP, § 3.7.7 (Attachment 5).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*, § 1.12.

"a proposed schedule of hourly charges and/or other services based pricing your company would normally use for a project of this scale."²⁶ The RFP recognized that the "strategic partnership" it was seeking "does not allow for firm, fixed pricing in all areas" since "the specific scope of work necessary for such pricing is impossible to ascertain."²⁷

Second, the RFP required a separate evaluation based exclusively on price once Ysleta identified the most highly qualified bidder. Ysleta would begin by negotiating prices with the bidder judged to be most capable of providing the required products and services based on its RFP response. If that bidder failed to agree to a "fair and reasonable price," Ysleta would eliminate it and begin negotiations with the next most highly qualified bidder, and so on, until it obtained a fair and reasonable price and entered into a contract. The relevant provision states as follows:

Evaluation ... Negotiations will be conducted with the offeror judged to be the most capable of meeting the District's needs in order to arrive at a fair and reasonable price for the services required. If, in the opinion of the District, it is impossible to arrive at a fair and reasonable price with the offeror judged most highly qualified, negotiations will be made with the offeror judged next most highly qualified until a contract is entered into.²⁸

Under the terms of the RFP, responses were required no later than November 15, 2001. Five potential service providers — Avnet Enterprise Solutions, Compaq, IBM, I-Next, Inc., and SBC — submitted RFP responses seeking to be Ysleta's Technology Implementation and Systems Integration

²⁶ *Id.*, § 3.7.7.

²⁷ *Id.*, § 3.7.7.

²⁸ *Id.*, § 1.12 (emphasis added).

Partner.” In response to the RFP’s request for “hourly charges and/or other services based pricing”,³⁰ each bidder submitted hourly rates for a range of technical skills.³¹ Thus, prior to making its initial determination of the most highly qualified bidder and entering into price negotiations for specific tasks with that bidder, Ysleta had pricing information from all five bidders.

Ysleta’s evaluation committee reviewed the responses of all vendors based on a number of characteristics, including pricing model and cost assurances, a category in which IBM and three other bidders received the maximum score.³² After considering the responses, the evaluation committee recommended IBM as the most qualified bidder to the Ysleta Board of Trustees. At a December 12, 2001, meeting, the Board of Trustees selected IBM as the most qualified bidder subject to the negotiations and contract finalization for specific tasks.³³

Consistent with the RFP evaluation requirements, Ysleta and IBM then began negotiating the scope of work and resulting prices for the specific products and services Ysleta needed to implement its Technology Plan and for which it would seek E-rate funding.³⁴ As part of those negotiations, Ysleta provided IBM

²⁹ Five parties (not all of which submitted bids) obtained copies of the RFP from Ysleta and an unknown number of parties were able to download copies of the RFP from Ysleta’s web site. Ysleta Request for Review at 9.

³⁰ Ysleta RFP, § 3.7.7 (Attachment 5).

³¹ See Avnet RFP Response at 48-50, Compaq RFP Response at 38-39, IBM RFP Response at 79-80, i-Next RFP Response at § 3.7.7, SBC RFP Response at 51, appended hereto as Attachment 6.

³² Ysleta Request for Review at 10 and Exhibit 13. The Solicitation Award Summary is also appended for convenience as Attachment 7.

³³ *Id.* at 10.

³⁴ *Id.*

with a “Project List.”³⁵ The Project List was based on the Project Summary referenced above, which contained Ysleta’s price estimates. The Project List identified in greater detail the services and products Ysleta was seeking but did not disclose Ysleta’s internal price estimates.

Based on the Project List, initial site surveys, and input from its technical team, IBM designed the system of products and services required to meet Ysleta’s needs and prepared draft Statements of Work (“SOW”). The draft SOWs included prices for the products and services IBM proposed to use and/or acquire on Ysleta’s behalf as the potential systems integrator and project manager for Ysleta. As described in greater detail by Ysleta in its Request for Review, Ysleta evaluated the prices in IBM’s draft SOWs based on its own independent marketplace research (which included discussions with and pricing information from other equipment vendors); the considerable expertise of its in-house IT procurement experts, who have over 75 years of combined experience with IT and IT procurement; comparisons with the services and prices obtained by comparable school districts; and Ysleta’s own procurement experience from contracts in prior funding years.³⁶ Using this information and expertise, Ysleta concluded that IBM’s pricing was reasonable but Ysleta’s Project List was too ambitious for its budget so it directed IBM personnel to prepare modified SOWs based on a reduced scope of work.³⁷ IBM modified the SOWs and provided new

³⁵ Project List, appended hereto as Attachment 16.

³⁶ Ysleta Request for Review at 8.

³⁷ *Id.* at 8.

draft SOWs with reduced prices to Ysleta, which Ysleta evaluated again, based on the information technology expertise and market research described above.

At the close of these negotiations, and after Ysleta determined that IBM's prices were "fair and reasonable," IBM and Ysleta entered into a General Contract on January 17, 2002, that incorporated the following Statements of Work ("SOWs"): Technical Support Services, Basic Unbundled Internet Access, Cabling Services, Network Servers, and Network Electronics.³⁸ The General Contract contained a provision entitled "Procurement of Products," which stated in pertinent part:

The District may direct IBM to particular vendors whom they may designate as the vendor for the Products specified in the various Statements of Work ...With respect to Products which IBM procures from such vendors ..., it is agreed that such Products will be acquired, though in accordance with procurement requirements of Texas law[,] through IBM as "general contractor" for the District, without any additional commission or fee on the price (except for a procurement administrative fee).³⁹

Pursuant to this clause, Ysleta had the right during the term of the Contract to review IBM's product pricing information and, if it chose, direct IBM to use particular vendors that IBM would be compelled to use consistent with Texas procurement law. Through this provision, Ysleta could ensure that any products required by the **SOWs** were procured on a cost-effective basis.

³⁸ YISD Contract No. 2002-850-142 ("General Contract"), appended hereto as Attachment 8.

³⁹ General Contract, "Procurement of Products" (emphasis added) (Attachment 8).

On January 17, 2002, after executing the Contract and associated SOWs, Ysleta submitted its FCC Form 471 to the SLD.⁴⁰ The Form 471 detailed the specific E-rate eligible products and services for which Ysleta sought funding.

Ysleta received its first E-Rate Selective Review Information Request ("Selective Review Request") from the SLD on May 13, 2002. On June 3, 2002, Ysleta filed its first response to the Selective Review Request.⁴¹ SLD and Ysleta exchanged follow-up correspondence throughout the month of June. In particular, in a June 21, 2002, letter to SLD, Ysleta stated that it selected IBM through a "competitive process" that consisted of both the Form 470 posting process and Ysleta's issuance of an RFP.⁴²

On December 3, 2002, SLD issued a Denial Letter and Further Explanation, which are the subject of the instant Request for Review, denying funding for some of the products and services described in Ysleta's Form 471.⁴³ In the Further Explanation, SLD set forth the following reasons for its decision regarding Ysleta's request for funding: (1) Ysleta selected a service provider by a process other than the FCC Form 470 posting process and without specifying the services being sought; (2) Ysleta selected a service provider in violation of the requirement that it choose the most cost-effective provider of service with cost being the primary factor; (3) Ysleta did not comply with FCC Form 470

⁴⁰ Ysleta Request for Review at 12

⁴¹ Facsimile from Richard Duncan, Ysleta to Michael Deusinger, SLD (June 3, 2002), appended hereto as Attachment 9.

⁴² Letter from Richard Duncan, Ysleta to Michael Deusinger, SLD (June 21, 2002), appended hereto as Attachment 12.

⁴³ Ysleta Request for Review at 6 n.1 (noting that some applications for funding were not denied by the Further *Explanation*).

posting requirements in addition to applicable state and local procurement laws; (4) IBM's proposal referred to ineligible services; (5) IBM's proposal emphasized development of a technology plan and structuring technology to maximize E-rate funding; and (6) similar language in other RFPs raised significant questions as to whether IBM was improperly involved in the selection process.

II. YSLETA SELECTED THE MOST COST-EFFECTIVE SERVICE PROVIDER THROUGH A COMPETITIVE BIDDING PROCESS THAT FULLY COMPLIED WITH FCC, SLD, AND STATE REQUIREMENTS

As described in the following paragraphs, Ysleta complied fully with the FCC's Form 470 posting requirements. Then, after conducting a competitive procurement in compliance with state and local procurement rules as the FCC's regulations require, Ysleta selected IBM as the most cost-effective provider of the products and services Ysleta wished to purchase.

A. Ysleta Complied with the FCC Form 470 Posting Process

Ysleta posted a complete and accurate FCC Form 470 on October 12, 2001, describing the products and services it wished to purchase and, pursuant to state and local procurement rules, released its RFP on October 17, 2001. The *Further Explanation* asserts that "Ysleta selected IBM to be its Technology Partner as a result of the RFP—which was not cited or otherwise referred to in Applicant's FCC Form 470."⁴⁴ This conclusion is factually incorrect and unsupported by the record before SLD. As Ysleta explained in writing to SLD, and as provided for in the FCC's rules, Ysleta selected IBM as a result of both

⁴⁴ *Further Explanation* at 4.

the Form 470 and the RFP.⁴⁵ Moreover, Ysleta complied fully with the FCC's Form 470 posting process and specifically referenced its RFP in the Form 470 at Item 15(f), as detailed in the paragraphs below.

Ysleta's Form 470 appropriately described, *inter alia*, the Internet Access and Internal Connections products and services it was seeking. Items 9 and 10 of the form require filing parties to indicate whether they do or do not have an RFP for the services covered by the form. Parties who check "yes" must provide the web site location for the RFP or the contact person who can provide copies of it to interested bidders. Ysleta properly checked "no" on Items 9 and 10 because there was, in fact, no RFP at the time Ysleta completed the form. Indeed, Ysleta could not have answered in any other way without violating its certification in Item 24 of the Form 470 that "all statements of fact contained herein are true."

Ysleta's indication that it had no RFP at the time it posted its Form 470 was the correct and accurate response to the Form 470, which fails to provide for situations like Ysleta's in which an RFP is released after the Form 470 is posted. Given the two choices available in Items 9 and 10 of the Form 470 for indicating the status of an RFP, Ysleta provided the only answer that was true at the time it filed the form—it checked "no" because it had published no RFP at that time. The RFP was not published until October 17, 2001.

⁴⁵ In its June 21, 2002, letter to SLD, Ysleta stated that it selected IBM through a "competitive process" that consisted of both the Form 470 posting process *and* Ysleta's RFP. See Letter from Richard Duncan, Ysleta to Michael Deusinger, SLD (June 21, 2002) (Attachment 12). The Further Explanation does not refer to or even acknowledge this letter. By ignoring this June 21 letter, SLD fails to explain the inconsistency between its statement of the facts and the record before it.

If SLD now considers Ysleta's response deficient, the deficiency lies with the Form 470. The limited options it presents for answering Items 9 and 10 stand in stark contrast to the options for answering Item 21, which allows a school district to indicate that the district's technology plan either: (1) "have/has been approved;" or (2) "will be approved by a state or other authorized body."⁴⁶ In order for applicants to provide similar prospective information regarding their plans for releasing RFPs after posting a Form 470, the Form 470 must be modified. Basic notions of fairness dictate that an applicant should not be penalized for failing to provide information that the Form 470 does not request. The confusion resulting from the Form 470's deficiencies was compounded by the unclear instructions and lack of consistency in the rules posted on the SLD website.⁴⁷

Despite the deficiencies in Form 470's line items for RFPs and the dearth of clear direction from the SLD, Ysleta nevertheless made a good faith effort to broadcast its intention to issue an RFP by stating in Item 15(f) of the form that "[t]he Ysleta Independent School District is seeking a Technology Implementation

⁴⁶ Ysleta Form 470, Item 21 (Attachment 4).

⁴⁷ SLD posted on its website erroneous instructions in its "Tip Sheet" for completing Items 9 and 10 in those cases where no RFP has been released. The "Tip Sheet" is appended hereto as Attachment 10. In this area, among others, the E-rate rules and regulations are baffling, confusing, and inconsistent. For example, the Further Explanation identifies "project management" as an ineligible service, Further Explanation at 8, even though project management is listed as an eligible service by SLD. Eligible Services List (Oct. 18, 2002) at 34, appended hereto as Attachment 11. Where SLD's guidance is ambiguous or confusing, Ysleta and its chosen service provider, IBM, should not be penalized for making reasonable attempts to conform to the applicable rules. See, e.g., *Trinity Broadcasting of Florida Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) ("Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished.")

and Systems Integration Partner.”⁴⁸ SLD fails to consider or even mention this information in the Further Explanation.

Ysleta’s responses on its Form 470 and subsequent release of its RFP not only complied with the FCC’s rules but ensured that the underlying objectives of the Form 470 were fully realized. Contrary to SLD’s apparent position in the *Further* Explanation, the Commission did not establish the Form 470 posting requirement as the sole vehicle by which applicants would select service providers. Instead, the Commission established the posting requirement to “provide a minimally burdensome means” for schools and libraries “to get competing providers *to* approach them, so that schools and libraries could then select the best service packages subject *to* their state and local *rules*.”⁴⁹ Thus, the Form 470 requests sufficient information for potential service providers to identify potential customers. When interested service providers must obtain additional information, such as information regarding the bid requirements of state and local procurement rules, they do so by consulting any additional documents or other notices required by those procurement rules, such as the applicant’s RFP. **As** the Commission has explained:

FCC Form 470, submitted by school and library applicants ... will instruct applicants to describe the services they seek and to include information sufficient to enable service providers to identify potential customers. We conclude that this information is adequate to serve the purposes underlying the website posting requirement by allowing schools and libraries to take advantage of the competitive marketplace. We conclude that any additional information contained

⁴⁸ See Ysleta Form 470, Item 15(f) (“Additional details: Use this space to provide additional details to help providers identify the services *you* desire”) (Attachment **4**).

⁴⁹ Federal-State *Joint* Board on Universal Service (Order), 15 FCC Rcd 6732,6733, ¶ 3 (1999) (emphasis added).

in an RFP that is not submitted for posting on the website under FCC Form[] 470 ... can be made available to interested service providers at the election of the school [or] library⁵⁰

Ysleta's competitive bidding process, and the role played by its Form 470 in that process, are wholly consistent with this purpose and the Commission's rules. The information provided by Ysleta's posted Form 470 alerted potential service providers to its procurement plans, provided sufficient information regarding the requested services to enable service providers to approach Ysleta as a potential customer, and clearly announced that Ysleta sought a Technology Implementation and Systems Integration Partner, despite the Form's limitations where the publication of an RFP occurs after the Form is posted. In addition, once the RFP was published, Ysleta posted it on its web site where it was accessible to any interested service providers on a nationwide basis.⁵¹

No potential bidder was prejudiced by this sequence of events. The combination of the Item 15(f) notice and the publication of Ysleta's RFP provided more than adequate notice to potential service providers of Ysleta's intention to procure E-rate services through an RFP published in compliance with state and local procurement processes. There is nothing in the Form 470 that discouraged or prevented any potential service provider from using the contact information in the Form 470 to contact Ysleta regarding the subset of E-rate services Ysleta sought to procure. Thus, Ysleta's Form 470 did not "mislead" potential service providers as the Further *Explanation* claimed nor has any party claimed that it

⁵⁰ Federal-State Joint Board on Universal Service (Fourth Order on Reconsideration), 13 FCC Rcd 5318, 5412, ¶ 162 (1997) ("*Fourth Reconsideration Order*") (emphasis added).

⁵¹ Ysleta Request for Review at 9

did.⁵² To the contrary, five service providers submitted bids to Ysleta. The presence of five competitors is objective proof that Ysleta's Form 470 accomplished exactly what the FCC's rules intend—providing "information sufficient to enable service providers to identify potential customers."⁵³

B. As Required by the FCC, Ysleta Followed the Competitive Bidding Procedures Mandated by State and Local Procurement Rules

The Further *Explanation* rejects Ysleta's funding application because it concludes that Ysleta's reliance on an RFP constituted use of a solicitation process other than the "FCC Form 470 Posting Process."⁵⁴ Claiming that "[t]he FCC regulatory framework governing the Schools and Libraries Support Mechanism does not allow applicants to select service providers through a process other than the FCC Form 470 posting,"⁵⁵ SLD denied funding to Ysleta on the grounds that Ysleta selected IBM as a result of Ysleta's RFP, rather than the Form 470 posting process.⁵⁶

This characterization of Ysleta's procurement process and the rules applicable to it is both factually and legally off the mark. The *Further Explanation* ignores key documents which show that, consistent with that framework, Ysleta's 470 and RFP processes were intertwined, if not one and the same. In addition, the rationale of the *Further Explanation* mistakenly inflates the role of the Form

⁵² *Further Explanation* at 5.

⁵³ *Fourth Reconsideration Order*, 13 FCC Rcd 5318, 5412, ¶ 162

⁵⁴ *Further Explanation* at 4.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*

470 beyond that envisioned by the FCC and embedded in its rules. The Commission has repeatedly acknowledged the pre-eminent role of state and local procurement processes and emphasized that its rules are intended to supplement, never supplant, those state and local rules. Accordingly, the FCC's regulatory framework specifically recognizes state and local procurement processes like that employed by Ysleta and requires applicants to follow those processes. Contrary to the suggestion of the Further Explanation, Ysleta's compliance with state requirements (through its use of an RFP) was not only permissible under the FCC's rules, it was mandatory.

1. The FCC's Rules and the Orders Adopting Them Require Applicants to Comply with State and Local Procurement Rules

As the FCC itself recognized when it created the schools and libraries subsidy mechanism, public sector school districts like Ysleta are subject to a variety of state and local procurement requirements when they enter into contracts for the products and services eligible for SLD support. Those rules frequently require bidders to submit information and agree to requirements that are simply not addressed by the FCC's rules or FCC Form 470. For example, bidders may be required to certify their compliance with a variety of socio-economic programs such as felony conviction notifications, worker's compensation insurance requirements, minority and female employment rules, etc

Form 470's summary description of functions and services does not include a delineation of the state and local requirements which service providers may need in order to submit a meaningful, detailed proposal that complies with

state and local law. Where state and local rules require it, public sector applicants must use RFPs or other state-approved procurement mechanisms in order to provide notice to bidders of state and local requirements and in order to obtain the additional information required by state and local procurement law.

The FCC recognized the force and effect of such state requirements and refused to preempt state or local procurement mechanisms when it created the Schools and Libraries Funding Mechanism. In the first *Universal Service Order*,⁵⁷ the Commission refused to impose its own bidding requirements, on the grounds that it was not exempting eligible schools or libraries from compliance with state or local procurement rules,⁵⁸ and emphasized that the Form 470 posting process “is in no way intended as a substitute for state, local, or other procurement processes.”⁵⁹

The Commission subsequently confirmed the supremacy of state and local procurement rules in the *Fourth Reconsideration of the Universal Service Order*.⁶⁰ In that *Fourth Reconsideration Order*, the FCC addressed requests that it exempt “minor contract modifications” from its competitive bidding rules. The Commission agreed to exempt minor modifications from the rules. Rather than establish a federal standard for what constitutes a “minor” modification, the Commission stated that it would “look to state or local procurement laws.”⁶¹ Only

⁵⁷ *Federal-State Joint Board on Universal Service (Report and Order)*, 12 FCC Rcd 8776 (1997) (“*Universal Service Order*”).

⁵⁸ *Universal Service Order*, 12 FCC Rcd at 9030, ¶ 482.

⁵⁹ *Id.* at 9078, ¶ 575.

⁶⁰ *Fourth Reconsideration Order*.

⁶¹ *Fourth Reconsideration Order*, 13 FCC Rcd at 5449, ¶ 225.

where state procurement law was silent did the Commission establish a federal standard.⁶²

The Commission's competitive bidding rules explicitly incorporate these prior determinations that applicants must follow state and local procurement rules. Section 54.504(a) states that “[t]hese competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.”⁶³

More recently, the Commission issued guidance on its competitive bidding policies when it reversed the SLD's denial of funding in the Request *for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator* (“Tennessee Order”).⁶⁴ The Commission emphasized that the Schools and Libraries Funding Mechanism relies on state and local procurement processes:

[W]e can generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements. That is, we believe it sensible ... to rely on state and/or local procurement rules and practices for determining compliance with our competitive bid requirements because such rules and practices will generally ... select the most cost-effective bid.⁶⁵

Thus, contrary to the characterization in the Further Explanation, the Commission's rules contemplate that applicants will rely—as Ysleta did here—on

⁶² *Id.* at 5449, ¶ 226

⁶³ 47 C.F.R. § 54.504(a) (*emphasis added*).

⁶⁴ Request for Review *by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator* (Order), 14 FCC Rcd 13734 (1999) (“Tennessee Order”).

⁶⁵ Tennessee Order, 14 FCC Rcd at 13739, 710 (*emphasis added*).

both the Form 470 posting process and state and local procurement mechanisms such as RFPs.⁶⁶

As the Ysleta Request for Review describes, its RFP and subsequent selection process were subject to state and local procurement rules with which it fully complied.⁶⁷ Contrary to the apparent assumption in the Further Explanation, Ysleta did not—and, indeed, could not—rely solely on the Form 470 “posting process” to select its service provider. Instead, Ysleta was required to comply with both the FCC’s requirements and state and local requirements by posting a Form 470 and issuing an RFP.

2. The Further Explanation Ignored Ysleta’s Information Regarding the *Interrelationship* of the RFP and the Form 470

The Further Explanation mischaracterizes Ysleta’s compliance with its state and local procurement processes and ignores relevant information provided by Ysleta. The Further *Explanation* relies solely on several references in a June 3 facsimile from Ysleta to declare that Ysleta selected **IBM** as its service provider “through the RFP process rather than through the 470 posting process.”⁶⁸

The Further *Explanation*’s artificial distinction between Ysleta’s Form 470 and the solicitation in its RFP is not, however, supported by the record before it. Ysleta eliminated any confusion that may have resulted from Ysleta’s initial

⁶⁶ The SLD itself recognizes that applicants like Ysleta are required to follow state procurement process. In the “Program Overview” section of SLD’s web site, the Division reminds applicants that they “must comply with all applicable state and local procurement rules and regulations and competitive bidding requirements.” See www.sl.universalservice.org/overview/form470.asp, last visited 1/28/03.

⁶⁷ Ysleta Request for Review at 26.

⁶⁸ Further Explanation at 4.

responses to SLD's questions about its vendor selection process in a June 21, 2002, response to follow-up questions from SLD.⁶⁹ In that letter, Ysleta explained that it selected IBM through a "competitive process" that consisted of both the Form 470 posting process *and* Ysleta's RFP. Only after "reviewing all RFP/470 responses" did Ysleta pick IBM.⁷⁰ As Ysleta explains in Section IV.I.B of its Request for Review, the RFP and the Form 470 were "intertwined" aspects of the same procurement exercise and any confusion resulting from the initial correspondence between SLD and Ysleta was clearly and unequivocally dispelled by Ysleta's June 21 letter.⁷¹ Unaccountably, the Further *Explanation* fails to acknowledge this letter's existence, much less address it.

C. Ysleta's Systems Integration RFP Allowed Ysleta to Select the Most Cost-Effective Provider of the Services Ysleta Needs

Ysleta's RFP solicited proposals for a technology implementation and systems integration "partner," a widely-accepted (and widely-endorsed) procurement strategy employed by state governments, as well as the federal government, in the acquisition of information technology.⁷² Systems integrators provide a valuable service to school districts like Ysleta who want to evaluate and obtain the most up-to-date and cost-effective solutions and information technology ("IT) available but do not have, or do not have the finances to hire,

⁶⁹ Letter from Richard Duncan, Ysleta to Michael Deusinger, SLD (June 21, 2002) (Attachment 12).

⁷⁰ *Id.* at 1

⁷¹ Ysleta Request for Review at 17

⁷² See, e.g., United States Customs Service—Customs Service Modernization RFP No. CS-00-005 (issued December 22, 2000). In addition, as Ysleta notes in its Request for Review at 36-37, the El Paso Independent School District used a systems integration approach in Funding Year 4, which resulted in a grant of funding by SLD.